

Pursuant to Federal Rule of Civil Procedure 37, Plaintiffs move to compel the production of documents and information that Defendants have withheld under the deliberative process privilege. The grounds for this motion are set forth in the accompanying memorandum and declaration. Plaintiffs have conferred with Defendants regarding the relief requested in this motion as required by Local Civil Rule 7(m); Defendants oppose this motion.

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INTRODUCTION

Plaintiffs challenge President Trump's 2017 decision to ban transgender people from serving in the military and the 2018 plan by the Secretary of Defense implementing that decision. This Court has held that the process the government used to develop the ban is central to this case and bears on both the applicable level of constitutional scrutiny and the merits of Plaintiffs' constitutional claims. Defendants have asserted that their decision to ban military service by transgender persons was based on an independent process that considered all options and is thus entitled to deference from the Court. But Defendants have refused, on the basis of the deliberative process privilege, to provide Plaintiffs with the most basic discovery they need to test that assertion, and have sought to shield from production virtually all documents and information related to the President's decision and the military's implementation plan.

Defendants' expansive assertion of privilege should be rejected, and Defendants should be compelled to produce the discovery necessary to ensure the expeditious resolution of this case. The deliberative process privilege does not apply here because the government's decisionmaking and intent in adopting the transgender ban are central to Plaintiffs' constitutional claims and the government's defenses. The government may not wield its deliberative process as both sword and shield. In addition, even if the privilege potentially applied, it is qualified and overcome by Plaintiffs' demonstrated need for the information they seek, which this Court has already recognized. Finally, Defendants have held back material that is neither predecisional nor deliberative and in many cases have failed to provide sufficient information for Plaintiffs and the Court to evaluate the claim of privilege. For each reason, Plaintiffs' motion to compel should be granted.

BACKGROUND

A. The President's Announcement And Defendants' Implementation Of The Ban On Transgender Military Service

In June 2016, the Department of Defense (“DOD”) adopted a policy permitting transgender persons to serve openly in the military. Dkt. 13-10, Ex. C. That policy represented the culmination of a lengthy process in which senior military and civilian officials evaluated a wide array of evidence and ultimately found no reason to exclude qualified personnel from military service simply because they are transgender. Dkt. 13-3 ¶¶ 10-27.

On June 26, 2017, President Trump announced via Twitter that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” Dkt. 61 at 14 & n.3. In contrast to the careful process preceding the policy that permitted open service, the President’s “abrupt” reversal was made “without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans,” and it contradicted the evidence-based conclusions of the military’s extensive study process that had taken place just a year earlier. *Id.* at 67-68.

The President formalized his decision in a directive to Secretary of Defense Mattis dated August 25, 2017. Dkt. 13-2, Ex. A (“2017 Presidential Memorandum”). The 2017 Presidential Memorandum ordered Secretary Mattis to submit “a plan for implementing” the President’s directive by February 21, 2018. *Id.* § 3. On August 29, 2017, Secretary Mattis issued a statement indicating that the Department had “received the [2017] Presidential Memorandum” and would “carry out the president’s policy direction.” Dkt. 128-21. In particular, Secretary Mattis confirmed that the Department would “develop a study and implementation plan.” *Id.* To develop that plan, the Department would “establish a panel of experts ... to provide advice and

recommendations on the implementation of the president’s direction,” and after that panel issued its recommendations, Secretary Mattis would “provide [his] advice to the president concerning implementation of [the president’s] policy direction.” *Id.*

About two weeks later, Secretary Mattis issued two other documents—the Interim Guidance and the Terms of Reference—that again reiterated that DOD would “carry out the President’s policy and directives.” Dkt. 45-1. The Terms of Reference established a panel to “develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives in [the] Presidential Memorandum.” Dkt. 108-6; *see also* Dkt. 128-25 (Acting Under Secretary of Defense for Personnel and Readiness to “chair a Panel of Experts (‘Panel’) ... to support the ... development of an Implementation Plan on military service by transgender individuals”).

The panel convened by Secretary Mattis issued its recommendations in February 2018, and Secretary Mattis delivered his proposal (the “Mattis Implementation Plan”) to the President on February 22, 2018. Dkt. 96-1. On March 23, 2018—the effective date for the 2017 Presidential Memorandum’s ban on military service by transgender persons, Dkt. 13-2—President Trump issued an order that “revoked” his earlier memorandum and accepted Secretary Mattis’s proposal, Dkt. 96-3.

The Mattis Implementation Plan effectuates the ban ordered by President Trump. As this Court has found, under the Mattis Implementation Plan, “individuals who require or have undergone gender transition are absolutely disqualified from military service; individuals with a history or diagnosis of gender dysphoria are largely disqualified from military service; and, to the extent that there are any individuals who identify as ‘transgender’ but do not fall under the first two categories, they may serve, but only ‘in their biological sex.’” Dkt. 160 at 6. Thus, “at

a fundamental level, the Mattis Implementation Plan is just that—a plan that *implements* the President’s directive that transgender people be excluded from the military.” Dkt. 157 at 9 (emphasis in original).

B. The Litigation and This Discovery Dispute

Plaintiffs, current and aspiring transgender service members, filed suit shortly after the President announced the ban, challenging the ban on the grounds that it violated their rights to equal protection, liberty, and privacy guaranteed by the Fifth Amendment of the U.S. Constitution. Dkt. 1. Plaintiffs moved for a preliminary injunction barring enforcement of the policy ordered by the 2017 Presidential Memorandum. Dkt. 13. On October 30, 2017, the Court ruled that Plaintiffs had established a likelihood of success on their equal protection claim, that they would be irreparably harmed absent preliminary injunctive relief, and that the balance of equities favored granting Plaintiffs relief. Dkt. 61 at 58-76. The Court ordered that “the status quo with regard to accession and retention that existed before the issuance of the Presidential Memorandum” be kept in place. *Id.* at 75-76.¹ After the announcement of the Mattis Implementation Plan, Plaintiffs filed a second amended complaint, which added plaintiffs and specifically challenged the Mattis Implementation Plan (as well as the earlier actions taken by the government to ban transgender military service). Dkt. 106.

In discovery, the government sought to shield information about the development of both the President’s initial decision and the Mattis Implementation Plan. The government objected to a significant majority of Plaintiffs’ requests for production of documents and interrogatories on

¹ The government initially appealed but dismissed its appeal after the D.C. Circuit refused to stay the preliminary injunction. *See* Order, *Doe v. Trump*, No. 17-5267 (D.C. Cir. Dec. 22, 2017); Notice of Voluntary Dismissal of Appeal, *Doe v. Trump*, No. 17-5267 (D.C. Cir. Dec. 29, 2017).

the basis of the deliberative process privilege and heavily redacted many documents it produced on that ground. *See* Dkt. 86-1 at 3.² Following a teleconference on February 16, 2018 about the government's privilege assertions, the Court ordered Plaintiffs to provide Defendants with a list of documents Plaintiffs believed to be wrongfully withheld. *See* Minute Order (Feb. 16, 2018). Although Plaintiffs provided the government with a list of 300 documents in mid-February, and although the government committed to responding to Plaintiffs' challenge to its assertion of the deliberative process privilege by March 2, 2018, the government provided its position on only 34 of the challenged documents. *See* Declaration of Alan E. Schoenfeld in Support of Plaintiffs' Motion to Compel Production of Documents and Information Withheld Under the Deliberative Process Privilege ("Schoenfeld Decl."), Ex A. Across the government's privilege logs, more than 40,000 documents are listed as being withheld or redacted on the ground of the deliberative process privilege (and, in some cases, other privileges like the presidential communications privilege).

The government also instructed two deposition witnesses not to answer numerous questions on the basis of the deliberative process privilege; Plaintiffs held those depositions open until after the Court resolved the parties' dispute over the applicability of the privilege. In addition, on April 20, 2018, Plaintiffs emailed the Court to request its guidance concerning two documents used at a deposition that the government had attempted to claw back under Rule 26(b)(5)(B) on the ground of the deliberative process privilege. Dkt. 118-1.

² The government also invoked the presidential communications privilege in response to several of Plaintiffs' discovery requests and refused to produce even an *in camera* privilege log of documents withheld on that ground. Minute Order (Feb. 16, 2018) ("With respect to the presidential communications privilege, Defendants refuse to provide any information to the Court for it to review *in camera* in order to adjudicate the legality of Defendants' assertion of privilege."). The presidential communications privilege is the subject of separate briefing ordered by the Court.

Following the release of the Mattis Implementation Plan, Defendants moved to dismiss the case and to dissolve the preliminary judgment. Defendants contended in those motions that the Mattis Implementation Plan represents a new and different policy from the enjoined directives of the President and is therefore entitled to deference as an exercise of independent military judgment. Dkts. 115, 116. Defendants have argued in particular that the Mattis Implementation Plan was the result of “an extensive study” and the “independent judgment” of the panel convened in response to the 2017 Presidential Memorandum. Dkt. 115 at 1, 17-22; *see also* Dkt. 116 at 1-2, 13-20 (citing the “professional, independent judgment of the Defense Department” as the basis for deference). In response, Plaintiffs argued that the Mattis Implementation Plan was constrained by the President’s order to ban transgender persons from military service and thus warrants no more deference than the President’s initial decision. *See* Dkt. 130 at 28-29; Dkt. 132 at 17-22.

On August 6, 2018, the Court denied the government’s motion to dismiss and motion to dissolve the preliminary injunction. Dkt. 156. In holding that Defendants had not justified vacating the preliminary injunction, the Court found that the same “unusual factors associated with the issuance of the 2017 directives are still relevant” to the constitutionality of the Mattis Implementation Plan:

[T]he Court is still concerned that, immediately prior to the announcement of the 2017 Presidential directives, the military had studied the issue and found no reason to exclude transgender service members. The Court is likewise still concerned that the President’s 2017 directives constituted an abrupt reversal in policy, and a *revocation* of rights, announced without any of the formality, deliberative process, or factual support usually associated with such a significant action. Although it makes no final ruling on the merits in this Memorandum Opinion, the Court is not convinced at this stage that the processes implemented by Defendants *after* President Trump’s 2017 Presidential Memorandum, and the memoranda that they have issued since that time, resolve the constitutional issues that persuaded the Court that a preliminary injunction was warranted in the first place. Based on the record before the Court, these *post hoc* processes and

rationales appear to have been constrained by, and not truly independent from, the President's initial policy decisions.

Dkt. 157 at 32-33.

On August 24, 2018, the Court denied the parties' cross-motions for summary judgment. Noting that "[d]espite the Court's orders, discovery remains unfinished because Defendants have asserted that a substantial portion of the documents and information sought by Plaintiffs are privileged," the Court held that the dispute over the independence of the process underlying the Mattis Implementation Plan was "material [because it] go[es] to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." Dkt. 160 at 5, 13. The Court explained that "the constitutionality of the challenged policy 'necessarily turns on facts related to Defendants' deliberative process,'" and in the absence of full discovery about that process, summary judgment was inappropriate at that time. *Id.* at 13 (quoting *Karnoski v. Trump*, 2018 WL 3608401, at *4 (W.D. Wash. July 27, 2018)). Given the critical nature of the deliberative process underlying the Mattis Implementation Plan, the Court stressed the need for discovery about that process:

Plaintiffs are entitled to complete discovery. As already stated above, despite the fact that one of Defendants' *main defenses* in this action is that their decisions regarding transgender military service are owed great deference because they are the product of reasoned deliberation, study and review by the military, Defendants have withheld nearly all information concerning this alleged deliberation. This is not how civil litigation works.

Id. at 14-15.

Following its denial of the motions for summary judgment, the Court ordered the parties to propose a process for the efficient resolution of the case. *See* Minute Order (Aug. 27, 2018). Recognizing that the application of the deliberative process privilege is a threshold issue likely to

arise in remaining document discovery and depositions, the parties agreed that the Court should resolve the dispute over the privilege now. Dkts. 165, 167.

LEGAL STANDARD

As a general rule, “the party resisting discovery ... must show ‘why discovery should not be permitted.’” *United States v. All Assets Held at Bank Julius Baer & Co.*, 202 F. Supp. 3d 1, 6 (D.D.C. 2016). More particularly, “[u]nder the federal common law, the proponent bears the burden of demonstrating the applicability of any asserted privilege.” *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 153 (D.D.C. 2012) (Kollar-Kotelly, J.) (citing *In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm’n*, 439 F.3d 740, 750 (D.C. Cir. 2006)). Consequently, the government bears the burden of demonstrating that the deliberative process privilege applies to the documents and information it seeks to withhold. *See id.* at 163; *United States v. Philip Morris USA Inc.*, 218 F.R.D. 312, 315 (D.D.C. 2003) (citing *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

ARGUMENT

As this Court recognized in its orders denying summary judgment and refusing to vacate the preliminary injunction, the process surrounding the announcement of the ban and leading up to the issuance of the Mattis Implementation Plan is central to this case. Defendants contend that the military engaged in an independent review that fully considered all options relating to military service by transgender people and concluded that such service should be barred. Plaintiffs contend that the 2017 Presidential Memorandum directed the military to formalize and justify the President’s decision to ban transgender people from serving, and the military’s process was constrained by that directive.

Defendants ask the Court to credit their account of the process and defer to the Mattis Implementation Plan as an independent exercise of military judgment—but they refuse to

provide Plaintiffs or the Court with sufficient information to determine whether (contrary to the express statements in the many of the documents they have provided) that process was genuinely independent. As this Court has pointed out, Defendants may not assert a defense and then refuse to allow Plaintiffs the information that they need to test that defense. Dkt. 160 at 15. Given the Court's decision that discovery into the process by which the government arrived at its decision to impose a ban is required to decide the merits of Plaintiffs' claims; and given the nature of the government's defenses, the government has no basis to refuse that discovery. The motion to compel should therefore be granted.

A. The Deliberative Process Privilege Is Inapplicable Because of the Nature of Plaintiffs' Claims and Defendants' Defenses

The government errs in arguing that the deliberative process privilege allows it to shield the withheld information at all. By invoking its deliberative process as a substantive defense in this case, the government has placed that process directly at issue and waived any protection from the deliberative process privilege. It is inconsistent with the adversary system of justice—and grossly unfair—for the government to insist that the Court must defer to the Mattis Implementation Plan as the product of supposedly independent and full deliberations and at the same time refuse discovery to test those assertions. That information is also central to Plaintiffs' claims, which contend that the government acted with an unconstitutional discriminatory purpose in developing and implementing its transgender service policies.

First, “[a]s the adage states, privilege cannot be used both as a sword and as a shield.” *Recycling Sols., Inc. v. District of Columbia*, 175 F.R.D. 407, 408 (D.D.C. 1997). That principle is fully applicable to the deliberative process privilege, *id.* at 408 n.2 (noting that the “issues raised and analysis made of them are identical” between the attorney-client privilege and the deliberative process privilege), and is also directly applicable to this case. Defendants have

argued that the Mattis Implementation Plan is owed deference as the result of the military's independent judgment, *see, e.g.*, Dkt. 115 at 1, 17-22; Dkt. 116 at 1-2, 13-20, while simultaneously invoking the deliberative process privilege to shield all materials and information that shed light on the process on which that judgment is based. Because the purportedly independent "deliberation, study and review by the military" is one of Defendants' "main defenses," Dkt. 160 at 14-15, they may not invoke the deliberative process privilege to withhold information Plaintiffs need to test that defense. *See Coleman v. Schwarzenegger*, 2007 WL 4328476, at *8 (E.D. Cal. Dec. 6, 2007) (recognizing that when a defendant relies on its deliberative process as its defense, that "will constitute a waiver of the deliberative process privilege"). Just as a party that invokes the advice of counsel as a defense cannot then claim that its attorney-client communications are shielded from discovery, *see Cox v. Administrator, U.S. Steel & Carnegie*, 17 F.3d 1387, 1419 (11th Cir. 1994); *Intex Recreation Corp. v. Metalast, S.A.*, 2005 WL 5099032, at *4 (D.D.C. Mar. 2, 2005), Defendants cannot assert their purportedly independent and thorough deliberative process as a reason for the Court to defer and then refuse to allow Plaintiffs and the Court to ascertain whether the process worked as the Defendants claim.

Second, the privilege is also inapplicable because Plaintiffs' constitutional claims put the governments' discriminatory intent in adopting and implementing the ban at issue. The deliberative process privilege applies only in "cases where the governmental decisionmaking process is *collateral* to the plaintiff's suit." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (emphasis added). By contrast, if—as in this case—"the plaintiff's cause of action is directed at the government's intent, ... it makes no sense to permit the government to use the privilege as a shield." *Id.*

In *In re Subpoena Duces Tecum*, the D.C. Circuit identified “a constitutional claim for discrimination” as an example of a case in which the deliberative process privilege may not be invoked, observing that the privilege is a “nonsequitur” if “the Constitution . . . makes the nature of governmental officials’ deliberations *the issue*.” *Id.* (emphasis in original).³ Courts in this district and elsewhere have thus held the privilege inapplicable in cases challenging unlawful discrimination by the government. *See Waters v. U.S. Capitol Police Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003) (explaining, in case alleging racial bias, that “this Circuit does not permit the application of the deliberative process privilege to thwart discovery of information in a case in which a plaintiff challenges governmental action as discriminatory”); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) (deliberative process privilege inapplicable in case alleging viewpoint discrimination under First Amendment); *Jones v. City of College Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (privilege “simply inapplicable” in race discrimination case under Title VII); *cf. Elkins v. District of Columbia*, 250 F.R.D. 20, 27 (D.D.C. 2008) (deliberative process privilege inapplicable where Fourth Amendment claim hinged on government agents’ intent in executing search).

Plaintiffs’ equal protection and due process claims are exactly the kind of constitutional cases that preclude application of the deliberative process privilege. *See* Dkt. 106 ¶¶ 90-101. As the Court has noted, two other courts hearing related claims have held that because the constitutional claims in these cases turn on the government’s intent in banning transgender people from the military, the government may not use the deliberative process privilege to

³ *See also United States v. Lake Cty. Bd. of Comm’rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (“[T]h[e] deliberative process privilege simply does not apply in civil rights cases in which the defendant’s intent to discriminate is at issue.”); *cf. McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (“[T]he privilege yields when the lawsuit is directed at the government’s subjective motivation in taking a particular action.”).

withhold documents and information shedding light on that intent. *See Karnoski v. Trump*, 2018 WL 3608401, at *4 (W.D. Wash. July 27, 2018); *Stone v. Trump*, 2018 WL 3866676, at *3 (D. Md. Aug. 14, 2018). Given the centrality of government intent to this case, the Court should order that Defendants provide Plaintiffs with the “complete discovery” necessary to probe that issue. Dkt. 160 at 14.

B. Plaintiffs’ Need for the Withheld Information Overcomes Defendants’ Assertion of the Deliberative Process Privilege

Even if the deliberative process privilege applied in this case, it would not justify the government’s decision to withhold information about the development and implementation of the transgender ban. The deliberative process privilege “is a qualified privilege and can be overcome by a sufficient showing of need.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). When the Court evaluates a claim of the deliberative process privilege, it “balanc[es] ... the competing interests” and considers (1) “the relevance of the evidence” sought, (2) “the availability of other evidence,” (3) “the seriousness of the litigation,” (4) “the role of the government,” and (5) “the possibility of future timidity by government employees.” *Id.* at 737-38 (quoting *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992)).

Each of those factors counsels in Plaintiffs’ favor. Plaintiffs’ need for the information withheld by the government overcomes the government’s interests in asserting the privilege, and Plaintiffs are entitled to the discovery they seek.

1. Relevance of the evidence

The relevance of the evidence weighs strongly in favor of Plaintiffs’ request for information concerning the development of the President’s tweets, his subsequent memoranda, and the Mattis Implementation Plan. This Court has already stated that this information goes “to

the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case,” such that “the constitutionality of the challenged policy ‘necessarily turns on facts related to Defendants’ deliberative process.’” Dkt. 160 at 13 (quoting *Karnoski*, 2018 WL 3608401, at *4). The Court further agreed with the *Karnoski* court’s observation that “Defendants may not simultaneously claim that deference is owed to the Ban because it is the product of ‘considered reason [and] deliberation,’ ‘exhaustive study,’ and ‘comprehensive review’ by the military ... while also withholding access to information concerning these deliberations, including whether the military was even involved.” *Id.* at 13-14 (quoting *Karnoski*, 2018 WL 3608401, at *4). “Here, the decisionmaking process is not ‘swept up into’ the case, it *is* the case. The issue here *is* the deliberative process.” *United States v. Board of Educ. of Chicago*, 610 F. Supp. 695, 700 (N.D. Ill. 1985). Consequently, the centrality of the withheld evidence to both Plaintiffs’ claims and Defendants’ defenses counsels strongly in favor of disclosure.

2. Availability of other evidence

In contrast to the public process underlying the 2016 decision to permit transgender people to serve openly in the military, the discussions in 2017 and 2018 that led the government to ban transgender military service took place entirely behind closed doors. There is no suggestion that evidence regarding those deliberations exists anywhere outside Defendants’ hands.⁴ In addition, the limited information the government has produced thus far is almost

⁴ The only indication that such evidence might exist outside government control comes from public statements by advocacy organizations opposing equality for transgender people that have suggested they had significant input into President Trump’s decision to reverse existing military policy and impose a ban. Plaintiffs have separately moved to obtain information about communications between those groups and the government. *See* Dkt. 109. But even if Plaintiffs obtain that information, it would only provide insight into the role of third parties in the process underlying the ban; it would not shed light on the process Defendants followed in implementing the transgender ban that the President ordered. As Defendants’ privilege logs indicate, tens of thousands of documents regarding that process have been withheld.

entirely unilluminating about the process by which the government decided to rescind the open service policy and ban transgender people from military service. As both this Court and the *Karnoski* court have recognized, that partial disclosure does not excuse the government from producing the remainder of the material speaking to its deliberations. *See* Dkt. 130 at 15 (observing that “Defendants have withheld nearly all information concerning this alleged deliberation”); *Karnoski*, 2018 WL 3608401, at *4.

3. Seriousness of the litigation

The seriousness of the matter now pending before the Court also strongly supports disclosure. Claims of unconstitutional discrimination are of paramount importance, especially where the government discriminates on the basis of a suspect or quasi-suspect classification, as this Court has already determined to be the case here. *See N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1123-24 (N.D. Cal. 2003). Consequently, courts regularly find that this factor favors disclosure in cases involving discrimination. *See, e.g., Texas v. Holder*, 2012 WL 13070113, at *2 (D.D.C. June 7, 2012) (claim regarding “the right to vote free of discrimination based on race or membership in a language minority group”); *Harding v. Cty. of Dallas*, 2016 WL 7426127, at *13 (N.D. Tex. Dec. 23, 2016) (claim regarding racially biased gerrymandering); *Newport Pac., Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) (“[T]his is an action alleging violations of federal constitutional magnitude. The tendency is therefore to allow discovery.”). Plaintiffs allege in this case that the ban on transgender people serving in the military violates their right to equal protection on the basis of gender as well as transgender status, and this Court has already recognized that these claims are subject to heightened scrutiny. Dkt. 61 at 59-64. The seriousness of this unconstitutional discrimination—particularly in the context of the military, a pillar of American society—weighs in favor of concluding that the deliberative process privilege is overcome.

4. Role of the government

This case directly challenges a government policy—a ban on transgender people serving openly in the military. “The fact that a governmental entity’s action is the focal point of litigation weighs against upholding the deliberative process privilege.” *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1028 (E.D. Cal. 2010) (collecting cases). This is not a case, therefore, “where privileged government documents are sought pursuant to a third-party subpoena and the government did not serve a central role in the allegedly unlawful conduct.” *Winfield v. City of New York*, 2018 WL 716013, at *12 (S.D.N.Y. Feb. 1, 2018). The centrality of government action to this case therefore weights in favor of disclosure.

5. Possible chilling effect on future government deliberations

Finally, the fifth factor, which focuses on the possible chilling effect on government deliberation caused by disclosure, does not support upholding the privilege. There is no reason to believe that disclosure here would chill future deliberations on future unspecified government policies. The extraordinary circumstances of this case—a discriminatory presidential proclamation that contradicts the professional judgments of the military and the available evidence, followed by a *post hoc* process designed to implement and justify that discrimination—are unlikely to be repeated. There is no reason to expect that disclosure dictated by *these* circumstances would chill deliberations in the overwhelming majority of governmental policy discussions that follow standard procedures and evaluate legitimate considerations. Moreover, to the extent disclosure *would* cause future governmental actors to think twice before adopting discriminatory policies and then attempting to justify those policies after the fact, that is beneficial, not a reason to shield such discussions from the normal discovery process. *Newport Pac.*, 200 F.R.D. at 640 (“[I]f because of this case, members of government agencies acting on

behalf of the public at large are reminded that they are subject to scrutiny, a useful purpose will have been served.”).

In sum, Plaintiffs’ need for the evidence and the nature of the case outweigh any factors that might support the government’s assertion of the deliberative process privilege and its withholding of critical information. The government will suffer no cognizable harm through illumination of the process by which it arrived at its decision to reverse existing military policy and ban transgender people from military service.

C. The Government Has Not Justified Its Sweeping Invocation of the Privilege

Even if the deliberative process privilege applied here, Defendants have invoked the privilege far too broadly. They have withheld documents and information plainly outside the bounds of the privilege, and at a minimum have not justified their broad assertions of the privilege. In the absence of a particularized and persuasive justification for their claims of privilege, Defendants should be ordered to produce the withheld material.

To be protected by the deliberative process privilege, a document must be both (1) predecisional, meaning that it was “generated before the adoption of an agency policy,” and (2) deliberative, meaning it “reflects the give-and-take of the consultative process” and “the personal opinions of the writer rather than the policy of the agency.” *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 160 (D.D.C. 2012) (Kollar-Kotelly, J.); *see Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007). The privilege does not protect factual material “unless it is inextricably intertwined with the deliberative material.” *Judicial Watch*, 841 F. Supp. 2d at 161. A substantial amount of the material withheld by the government fails this test—or at least the government has not yet justified its refusal to produce it.

The government has designated information contained in more than 40,000 documents as subject to the deliberative process privilege. In February, at the Court's instruction, Plaintiffs identified approximately 300 documents from Defendants' privilege logs that they believed were either post-decisional or not deliberative. The Court ordered Defendants to provide updated privilege assertions for those 300 documents by early March, but by mid-April, Defendants had provided revised assertions for only 34 documents. *See* Schoenfeld Decl., Ex. A.⁵

The few documents for which Defendants provided revised explanations strongly suggest that their privilege claims have been overbroad across the board. Those 34 documents, all of which date from the time of the President's tweets, were initially described as reflecting "[d]eliberations regarding the formulation of the transgender policy," "[d]eliberations regarding the implementation of the transgender policy," and "[d]eliberations regarding the rescission of the transgender policy." Schoenfeld Decl., Ex. B. Those original descriptions told Plaintiffs essentially nothing at all regarding the documents' contents or how the documents fit into the alleged deliberations.

The revised log descriptions are no better, and if anything make clear that many of Defendants' privilege claims are unfounded. Some of the documents are listed as discussing "transgender policy in view of Presidential announcement," "transgender working group and

⁵ In the course of the parties' meet and confer process, Plaintiffs have identified roughly 300 documents that, based on their corresponding privilege log descriptions, appear likely to be erroneously withheld under the deliberative process privilege. Those documents are merely exemplary of Plaintiffs' dispute with the government's assertion of the privilege. Should the Court agree with Plaintiffs as to their generally applicable arguments about the unavailability of the privilege in this case (*see supra* Sections A and B), or their more particularized objections to the government's overbroad assertion (*see infra* Section C), Plaintiffs respectfully submit that the parties should be required to meet and confer to discuss a process for the government to re-review and produce all documents previously withheld pursuant to the deliberative process privilege in light of the Court's ruling.

implimentation [sic] of transgender policy,” or “policies governing transgender individuals’ service in military.” *See* Schoenfeld Decl., Ex. B. But the logs fail to explain how discussions “in view of Presidential announcement” could have been predecisional when the relevant decision—the President’s announcement of the ban via Twitter—had already been made. *See Judicial Watch, Inc.*, 449 F.3d at 151 (to qualify for deliberative process privilege, document must be “generated before the adoption of an agency policy”). Nor do the logs explain how documents concerning the “implimentation [sic]” of the President’s policy could have been either predecisional or deliberative, given that the discussion was about implementing a policy decision that had been made (to ban transgender military service), not deliberating what the policy should be. And some of the descriptions—for instance, those discussing requests for information regarding “policies governing transgender individuals’ service in military”—are no more specific than the hopelessly generic descriptions that were insufficient in the first instance.

Defendants’ privilege logs suggest that the government’s overbroad claims of privilege go far beyond those 34 documents. Thousands of entries on the log postdate the President’s July 26, 2017 decision to ban transgender people from serving openly in the military. Documents related to the process that merely implemented this decision, Dkt. 130 at 32, are not predecisional and thus are not subject to the deliberative process privilege, *see Judicial Watch, Inc.*, 449 F.3d at 151. Similarly, thousands of entries list documents as having been withheld or redacted as “[d]eliberations regarding the implementation of the transgender policy.” Documents that merely implement a policy decision that has been cannot be said to be predecisional or deliberative. And the generic descriptions of documents included in the logs provide effectively no information Plaintiffs and the Court could use to test the government’s assertions of privilege. Thousands of documents are being withheld on the same vague grounds

that were originally offered for the 34 documents described above—namely, “[d]eliberations regarding the formulation of the transgender policy,” “[d]eliberations regarding the implementation of the transgender policy,” and “[d]eliberations regarding the rescission of the transgender policy.” Those generic descriptions are insufficient to substantiate any claim of privilege, as they provide no insight whatsoever into how the documents being withheld were deliberative.⁶ *Judicial Watch*, 841 F. Supp. 2d at 162 (stating that “legal boilerplate” that was “so generic and non-specific that ... the Court cannot meaningfully assess whether the information withheld is predecisional and deliberative” is insufficient to substantiate assertion of privilege).

The government has also made inappropriate or overbroad assertions of the deliberative process privilege in depositions. In the deposition of Col. Mary Krueger, the Assistant Deputy for Health Affairs in the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs, counsel for Plaintiffs asked whether the “panel of experts” considered a return

⁶ The overbreadth of the government’s claims of privilege is confirmed by some productions that the government has made when it has been pressed. In this case, for example, the government eventually produced an unclassified statement that the Air Force had not received any new guidance and that questions about the President’s tests should be referred to the White House, *see* Schoenfeld Decl., Ex. C, and another document reflecting a request to attend public hearings before Congress, *see* Schoenfeld Decl., Ex. D. Similarly, when the government eventually produced materials in response to a FOIA request and lawsuit—including records it had withheld in this case—it became clear that its privilege assertions were overbroad. Several of those documents concerned Department of Defense employees’ reactions to the President’s decision after it was announced, without the faintest suggestion that the employees in question were engaged in deliberation about the policy. *See American Oversight v. U.S. Dep’t of Defense*, No. 1:17-cv-2707 (D.D.C.), documents available at <https://www.americanoversight.org/document/dod-records-regarding-trumps-tweet-banning-transgender-military-servicemembers> (pages DOD-17-0465-A-000026, DOD-17-0465-A-000042). The government’s documented record of withholding documents that are plainly neither predecisional nor deliberative strongly suggests that many of its remaining claims of privilege are also unjustified—but the government also has not provided the information that would allow Plaintiffs to test, or this Court to evaluate, those claims.

to the policy permitting open military service by transgender people as a possible policy, and counsel for Defendants instructed the witness not to answer—notwithstanding the fact that Defendants have affirmatively represented in their briefing that the “panel of experts” conducted its analysis without any starting assumptions or any presumptions for or against certain outcomes. *See* Schoenfeld Decl., Ex. E; Dkt. 115 at 43. And in the deposition of Martha Soper, the Assistant Deputy for Health Policy in the Office of the Deputy Assistant Secretary of the Air Force for Reserve Affairs & Airman Readiness, counsel for Plaintiffs asked whether the “panel of experts” had recommended that transgender people only be allowed to accede to the military if they would not seek to undergo gender transition. Schoenfeld Decl., Ex. F. Counsel for Defendants again objected, notwithstanding the fact that the recommendation had already been decided on—and the fact that the policy as framed in the question is exactly what was later announced. *See id.*; Dkt. 96-1.

As the record stands now, therefore, Plaintiffs have received heavily redacted documents and a privilege log indicating that thousands of documents have been withheld, but virtually no information explaining why the withheld materials are either predecisional or deliberative—and strong reason to believe that they are neither. In these circumstances, Defendants’ claim of privilege cannot be sustained.⁷

CONCLUSION

Plaintiffs’ motion to compel should be granted.

⁷ On April 20, 2018, Plaintiffs also brought to the Court’s attention a dispute between the parties over whether certain documents used at the deposition of Col. Krueger are covered by the deliberative process privilege. The government sought to claw back those documents as having been inadvertently produced. The Court deferred resolution of that dispute until after its decision on the pending dispositive motions. Dkt. 118. That dispute can now be resolved along with the rest of the parties’ dispute over the privilege.

October 9, 2018

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JANE DOE 2 <i>et al.</i> ,)	
	Plaintiffs,)	Civil Action No. 17-cv-1597 (CKK)
v.)	
)	
JAMES N. MATTIS, in his official capacity as)	
Secretary of Defense, <i>et al.</i> ,)	
	Defendants.)	
<hr/>)	

DECLARATION OF ALAN E. SCHOENFELD
IN SUPPORT OF PLAINTIFFS’ MOTION TO COMPEL PRODUCTION OF
DOCUMENTS AND INFORMATION WITHHELD UNDER THE DELIBERATIVE
PROCESS PRIVILEGE

I, Alan E. Schoenfeld, hereby declare:

1. All facts set forth herein are based on my personal knowledge, and if called upon to testify as to the contents of this Declaration, I could and would do so.

2. I am an attorney with the law firm of Wilmer Cutler Pickering Hale and Dorr LLP, counsel for Plaintiffs in the above-captioned matter.

3. I provide this declaration in support of Plaintiffs’ Motion to Compel Production of Documents and Information Withheld Under the Deliberative Process Privilege.

4. Attached hereto as **Exhibit A** is a true and correct copy of an email from Daniel McFadden to the Chambers of Judge Colleen Kollar-Kotelly, dated April 13, 2018.

5. Attached hereto as **Exhibit B** is a true and correct copy of a document titled “Revised Log Entries for DoD Prod004 Challenged in Doe – Copy” emailed from Ryan Parker to Daniel McFadden on March 13, 2018.

6. Attached hereto as **Exhibit C** is a true and correct copy of a document produced in this case with the Bates stamp DOD00002761.

7. Attached hereto as **Exhibit D** is a true and correct copy of a document produced in this case with the Bates stamp DOD00002763.

8. Attached hereto as **Exhibit E** is a true and correct copy of an excerpt of the transcript of the deposition of Mary Krueger on April 17, 2018.

9. Attached hereto as **Exhibit F** is a true and correct copy of an excerpt of the transcript of the deposition of Martha Soper on February 1, 2018.

I declare under pains of perjury that the foregoing is true and correct.

Dated: October 9, 2018
New York, New York

/s/ Alan E. Schoenfeld
Alan E. Schoenfeld

EXHIBIT A

From: McFadden, Daniel L <DMcFadden@foleyhoag.com>
Sent: Friday, April 13, 2018 3:35 PM
To: Kollar-Kotelly_Chambers@dcd.uscourts.gov
Cc: Parker, Ryan (CIV); Carmichael, Andrew E. (CIV); Enlow, Courtney D. (CIV); CLL@foleyhoag.com; Schoenfeld, Alan E; Wolfson, Paul
Subject: Doe v. Trump, Case No. 17-01597: Request for Teleconference re: Discovery Disputes

Chambers of Judge Kollar-Kotelly,

I am counsel for Plaintiffs in *Doe v. Trump*, No. 17-01597. Defendants' counsel is included on this email. I write pursuant to the Court's Scheduling and Procedures Order (Docket No. 71) to request a teleconference with the Court concerning certain discovery disputes that have arisen among the parties. In summary, the disputes are:

1. Plaintiffs are seeking documents and information concerning the deliberations of the Panel of Experts created to advise the senior leadership of the Department of Defense and the Panel's communications with those leaders. *See, e.g.*, Doc. Reqs. 4, 20, 21, & 22. Defendants have placed these deliberations and communications squarely at issue in the litigation, including by asserting (contrary to Secretary Mattis's own written order creating the Panel) that the Panel's deliberative process constituted an exercise of "professional, independent judgment" rather than an "implementation" of the President's policy. *See, e.g.*, Mot. to Dissolve Inj. (Docket No. 96) at 1. There is no way to fairly test Defendants' assertion without reviewing the Panel's actual deliberations and communications. In such circumstances, the deliberative process privilege does not apply. *See In re Subpoena*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (deliberative process privilege does not apply where "the nature of the governmental officials' deliberations [is] the issue," including in constitutional claims for discrimination); 6 Moore's Federal Practice – Civil Sec. 26.52[5] ("[T]he deliberative process privilege does not apply when the decision-making process itself is the subject of the litigation, such as in cases alleging discriminatory hiring practices."); *see also Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) (even attorney-client privilege is implicitly waived when "the client places otherwise privileged matters in controversy"). Further, even if the qualified deliberative process privilege did apply, the Defendants' assertion would create a need sufficient to overcome it. *See, e.g., In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Nevertheless, Defendants are maintaining their claim that all information concerning the Panel of Experts should be withheld as privileged, except for the strictly factual information considered by the Panel.
2. Plaintiffs seek the Court's assistance in resolving the deliberative process privilege issue they first raised in February. Specifically, in a letter to the Court dated February 12,

2018, Plaintiffs disputed Defendants' assertion of deliberative process privilege over "documents concerning military service of transgender individuals between the date the President announced his decision to ban transgender individuals from service, July 26, 2017, and his issuance of implementing guidance in a presidential Memorandum on August 25, 2017," which appear to be post-decisional. Pursuant to the Court's instructions, Plaintiffs provided Defendants with a list of disputed documents on February 14, 2018 (and a short supplemental list on February 17, 2018). On February 16th, the Court ordered Defendants to "review those documents and consult with Plaintiffs next week [*i.e.*, by February 23rd] to discuss whether they are willing to release some or all of those documents, or at least provide Plaintiffs with more information about the documents so that Plaintiffs can consider the appropriateness of Defendants' assertions of privilege." The parties conferred on February 23rd and, at Defendants' request, agreed that, by March 2nd, Defendants would report for each document whether the assertion of privilege was withdrawn or, if not, whether Defendants would provide any supplemental information to justify the assertion of privilege. Defendants subsequently requested an extension of time until March 6th for certain groups of documents, and Plaintiffs agreed. Plaintiffs have repeatedly reminded Defendants of these agreements. Nevertheless, even today, more than a month after the agreed deadline, it appears that Defendants have provided their position concerning only about 34 of the roughly 300 documents challenged in February. Plaintiffs are requesting that the Court set a date certain for Defendants to provide the agreed responses as to all documents challenged in February and to produce any documents as to which the claim of privilege is withdrawn. Further, Plaintiffs have raised additional challenges since February (as Defendants have continued to produce privilege logs and redacted documents) and seek a concrete timeline for Defendants' responses.

3. Plaintiffs seek the Court's assistance in establishing a concrete timeline for the completion of Defendants' document production. The parties had originally agreed that Defendants would produce all documents by February 2nd. That has not occurred. Defendants have now informed Plaintiffs that their rolling document productions will not be complete until at least the end of May. The uncertainty regarding the completion of Defendants' production makes discovery planning extremely difficult. Plaintiffs ask the Court to set a date certain for the completion of Defendants' production, preferably by early May.

Respectfully submitted,
Daniel L. McFadden

Daniel McFadden | Associate

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EXHIBIT B

DOD BEGIN BAT PROD004 BEGIN BATES PROD004 END BATES	DATE	AUTHOR	RECIPIENT(S)	REVISED DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS		
Do000002749	USDOE00073590	USDOE00073590	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>; Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; Smith, David J SES OSD OUSD P-R (US) <david.j.smith152.civ@mail.mil>; Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>	Email conversation involving military and civilian employees of the Office of the Under Secretary of Defense for Personnel and Readiness and attorneys (DoD Personnel and Readiness) from OGC, including Paul Koffsky (performing the duties of DoD GC), concerning communication from White House counsel's office about policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Seeking or providing legal advice regarding transgender policy
Do000002750	USDOE00073591	USDOE00073591	7/26/2017	Thomas, James A Jr CIV (US) <james.a.thomas329.civ@mail.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Cooper, Willie L (WILL) III Lt Col USAF OSD OASD LA (US) <willie.l.cooper10.mil@mail.mil>; Haverstick, Paul R Jr LTC USARMY OSD PA (US) <paul.r.haverstick.mil@mail.mil>; Michael, Johnny J Jr CIV OSD PA (US) <johnny.l.michael2.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Email conversation between DoD Personnel and Readiness employees regarding transgender policy work group deliberations and the implementation of transgender policy in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
Do000002751	USDOE00073592	USDOE00073592	7/26/2017	Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>	Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Smith, David J SES OSD OUSD P-R (US) <david.j.smith152.civ@mail.mil>; Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>	Continuation of email discussion in Do000002749 from chief of staff of DoD Personnel and Readiness to John Casciotti, an OGC attorney, regarding communication from the White House counsel's office about policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
Do000002752	USDOE00073593	USDOE00073593	7/26/2017	Smith, David J SES OSD OUSD P-R (US) <david.j.smith152.civ@mail.mil>	Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>	Continuation of email discussion in Do000002749 from Deputy Assistant Secretary of Defense for Force Health Protection and Readiness to John Casciotti, an OGC attorney, regarding communication from the White House counsel's office about policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Seeking or providing legal advice regarding transgender policy
Do000002753	USDOE00073594	USDOE00073594	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>; Smith, David J SES OSD OUSD P-R (US) <david.j.smith152.civ@mail.mil>; Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>	Continuation of email discussion in Do000002749 from the Director of Military Accession Policy to John Casciotti, an OGC attorney, regarding communication from the White House counsel's office about policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Seeking or providing legal advice regarding transgender policy
Do000002754	USDOE00073595	USDOE00073595	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Thomas, James A Jr CIV (US) <james.a.thomas329.civ@mail.mil>; Cooper, Willie L (WILL) III Lt Col USAF OSD OASD LA (US) <willie.l.cooper10.mil@mail.mil>; Haverstick, Paul R Jr LTC USARMY OSD PA (US) <paul.r.haverstick.mil@mail.mil>; Michael, Johnny J Jr CIV OSD PA (US) <johnny.l.michael2.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Continuation of email discussion in Do000002750 from the Director of Military Accession Policy to DoD Personnel and Readiness personnel regarding transgender policy working group deliberations and the implementation of transgender policy in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
Do000002755	USDOE00073596	USDOE00073596	7/26/2017	Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>	Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Smith, David J SES OSD OUSD P-R (US) <david.j.smith152.civ@mail.mil>; Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>	Continuation of email discussion in Do000002749 from John Casciotti, an OGC attorney, concerning communication from the White House counsel's office about policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Seeking or providing legal advice regarding transgender policy
Do000002756	USDOE00073597	USDOE00073597	7/26/2017	Walsh, Laurel Col SD <Laurel.Walsh@sd.mil>	Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>; Jarrett, Michael R (Rich) CDR USN OSD OUSD P-R (US) <michael.r.jarrett2.mil@mail.mil>; Sims, Pettis N LCDR USN OSD OUSD P-R (US) <pettis.n.sims.mil@mail.mil>; Donnelly, Sally B SES (US) <sally.donnelly@sd.mil>; Sweeney, Kevin M SES (US) <kevin.sweeney@sd.mil>; Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>; Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; DeMartino, Anthony G SES (US) <tony.demartino@sd.mil>	Continuation of email discussion in Do000002749 from the Special Assistant to the Chief of Staff for the Secretary of Defense to attorneys from OGC and personnel from DoD's Personnel and Readiness regarding communication from the White House counsel's office about policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Seeking or providing legal advice regarding transgender policy;
Do000002757	USDOE00073598	USDOE00073598	7/26/2017	Sweeney, Kevin SES SD <Kevin.Sweeney@sd.mil>	Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>; Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; DeMartino, Anthony G SES (US) <tony.demartino@sd.mil>; Donnelly, Sally B SES (US) <sally.donnelly@sd.mil>; Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>; Walsh, Laurel Col SD <Laurel.Walsh@sd.mil>	Continuation of email discussion in Do000002749 from Chief of Staff for the Secretary of Defense to Paul Koffsky, who was performing the duties of the General Counsel for the Department of Defense, regarding communication from the White House counsel's office about policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Seeking or providing legal advice regarding transgender policy
Do000002758	USDOE00073599	USDOE00073599	7/26/2017	Koffsky, Paul S SES OSD OGC (US) <paul.s.koffsky.civ@mail.mil>	Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Penrod, Virginia S SES OSD OUSD P-R (US) <vrginia.s.penrod.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Sweeney, Kevin M SES (US) <kevin.sweeney@sd.mil>; Donnelly, Sally B SES (US) <sally.donnelly@sd.mil>; Tomatz, Michael D Col USAF OSD OGC (US) <michael.d.tomatz.mil@mail.mil>; Guillen, Robert A Jr MAJ USARMY (US) <robert.a.guillen4.mil@mail.mil>	Original email in discussion in Do000002749 from Paul Koffsky, who was performing the duties of the General Counsel for the Department of Defense, to OGC attorneys and DoD's Personnel and Readiness employees regarding communication from the White House counsel's office about policies governing transgender individual's service in the military	AC - Attorney Client Privilege; DP - Deliberative Process; EP - Executive Privilege	Attorney mental impressions regarding matter in litigation or anticipated litigation; Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Seeking or providing legal advice regarding transgender policy
Do000002759	USDOE00073600	USDOE00073600	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; Smith, David J SES OSD OUSD P-R (US) <david.j.smith152.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Jarrett, Michael R (Rich) CDR USN OSD OUSD P-R (US) <michael.r.jarrett2.mil@mail.mil>; Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>	Continuation of email discussion in Do000002750 from the Director of Military Accession Policy to DoD Personnel and Readiness personnel regarding transgender policy working group deliberations and the implementation of transgender policy in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy

DOC BEGIN BAT PROD004 BEGIN BATES PROD004 END BATES	DATE	AUTHOR	RECIPIENT(S)	REVISED DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS		
DoD00002760	USDOE00073601	USDOE00073601	7/26/2017	Beyler, Juliet SES ASN (M&RA), MMP <juliet.beyler@navy.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Email from the Deputy Assistant Secretary of the Navy for Military Manpower & Personnel to the Director of Military Accessions Policy regarding transgender working group and implementation of transgender policy	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD00002761	USDOE00073602	USDOE00073602	7/26/2017	Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Defendant will disclose DoD00002761		
DoD00002762	USDOE00073603	USDOE00073603	7/26/2017	Haverstick, Paul R Jr LTC USARMY OSD PA (US) <paul.r.haverstick.mil@mail.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil> Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; Lovisonne, Gail R CIV (US) <gail.r.lovisone.civ@mail.mil>; Ochoa, Laura C CIV OSD PA (US) <laura.c.ochoa.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Email discussion between a member of the office of the Assistant to the Secretary of Defense for Public Affairs and the Director of Military Accessions Policy regarding transgender policy in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD00002763	USDOE00073604	USDOE00073604	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Knizner, Lauren M CIV (US) <lauren.m.knizner.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Fucci, Michael J CIV OSD OGC (US) <michael.j.fucci.civ@mail.mil>	Defendant will disclose DoD00002763		
DoD00002764	USDOE00073605	USDOE00073605	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US) <kevin.r.bentz.mil@mail.mil>Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>	Email response from the Director of Military Accessions Policy concerning USMPCOM guidance to commanders for communications about accessions for transgender individuals	DP - Deliberative Process	Deliberations regarding the implementation of the transgender policy
DoD00002765	USDOE00073606	USDOE00073606	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Haverstick, Paul R Jr LTC USARMY OSD PA (US) <paul.r.haverstick.mil@mail.mil>Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; Lovisonne, Gail R CIV (US) <gail.r.lovisone.civ@mail.mil>; Ochoa, Laura C CIV OSD PA (US) <laura.c.ochoa.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Email discussion between a member of the office of the Assistant to the Secretary of Defense for Public Affairs and the Director of Military Accessions Policy regarding transgender policy in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the implementation of the transgender policy
DoD00002771	USDOE00073611	USDOE00073611	7/26/2017	Beyler, Juliet SES ASN (M&RA), MMP <juliet.beyler@navy.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Fedrigo, John A SES USAF SAF-MR (US) <john.a.fedrigo.civ@mail.mil>; Salo, Donald G Jr SES USARMY HQDA ASA MRA (US) <dona1d.g.salo2.civ@mail.mil>; Ingram, Elena P CAPT USN ASSTSECNAV MRA DC (US) <elena.ingram@navy.mil>	Email in chain in DoD00002760 from the Deputy Assistant Secretary of the Navy for Military Manpower & Personnel to the Director of Military Accessions Policy regarding transgender working group and implementation of transgender policy	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD00002774	USDOE00073614	USDOE00073614	7/26/2017	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Email from Principal Director, Military Personnel Policy, in the office of the Deputy Assistant Secretary of Defense, Military Personnel Policy, to Director of Military Accessions Policy concerning policies governing transgender individuals' service in the military	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD00002775	USDOE00073615	USDOE00073615	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>; Brown, Gary W LTC USARMY OSD OUSD P-R (US) <gary.w.brown.mil@mail.mil>	Email from Director of Military Accessions Policy forwarding response to request for information from John Casciotti, an attorney from OGC, regarding policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; seeking information to provide legal advice regarding transgender policy
DoD00002777	USDOE00073617	USDOE00073617	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Beyler, Juliet SES ASN (M&RA), MMP <juliet.beyler@navy.mil>; Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Fedrigo, John A SES USAF SAF-MR (US) <john.a.fedrigo.civ@mail.mil>; Salo, Donald G Jr SES USARMY HQDA ASA MRA (US) <dona1d.g.salo2.civ@mail.mil>; Ingram, Elena P CAPT USN ASSTSECNAV MRA DC (US) <elena.ingram@navy.mil>	Email in chain in DoD00002760 from the Director of Military Accessions Policy to the Deputy Assistant Secretary of the Navy for Military Manpower & Personnel regarding transgender working group and implementation of transgender policy	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD00002778	USDOE00073618	USDOE00073618	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>; Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Mellilo, Michael R CIV OSD OUSD P-R (US) <michael.r.mellilo4.civ@mail.mil>; Bauer, Kent P CIV OSD OUSD P-R (US) <kent.p.bauer.civ@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>	Email from Director of Officer and Enlisted Personnel Management to Director of Military Accessions regarding guidance concerning policies governing transgender individuals' service in the military in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD00002779	USDOE00073619	USDOE00073619	7/26/2017	Raymond, Lacey CIV SD <Lacey.Raymond@sd.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Email from Director of Military Accessions Policy forwarding guidance from the Deputy Secretary of Defense spokesperson concerning policies governing transgender individuals' service in the military in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD00002781	USDOE00073620	USDOE00073620	7/26/2017	Adirim, Terry A SES OSD HA (US) <terry.a.adirim.civ@mail.mil>	Casciotti, John A SES OSD OGC (US) <john.a.casciotti.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Email in chain in DoD00002775 from the acting Principal Deputy Assistant Secretary of Defense for Health Affairs responding to request for information from John Casciotti, an attorney from OGC, regarding policies governing transgender individuals' service in the military	AC - Attorney Client Privilege; DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; seeking information to provide legal advice regarding transgender policy
DoD00002783	USDOE00073622	USDOE00073622	7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Gearhart, Lee P COL USARMY OSD OUSD P-R (US) <lee.p.gearhart.mil@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>; Washington, Keithen A Lt Col USAF OSD OUSD P-R (US) <keithen.a.washington.mil@mail.mil>; Dyer, Evelyn J CIV OSD OUSD P-R (US) <evelyn.j.dyer.civ@mail.mil>; Brown, Gary W LTC USARMY OSD OUSD P-R (US) <gary.w.brown.mil@mail.mil>; Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US) <kevin.r.bentz.mil@mail.mil>	Email discussion between a member of DoD's Personnel and Readiness and the Director of Military Accessions Policy concerning policies governing transgender individuals' service in military in view of Presidential announcement	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy

DoD	BEGIN	BAT	PROD004	BEGIN	BATES	PROD004	END	BATES	DATE	AUTHOR	RECIPIENT(S)	REVISED DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
DoD000002784	USDOE00073623			USDOE00073623					7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>	Email from Director of Military Accessions Policy to Dave Gruber, an OSG attorney, requesting participation of the Office of General Counsel in meeting regarding policies governing transgender individuals' service in military	AC - Attorney Client Privilege; DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Seeking or providing legal advice regarding transgender policy; Seeking or providing legal advice regarding litigation risk
DoD000002785	USDOE00073624			USDOE00073624					7/26/2017	MILLER, Stephanie P SES OSD OUSD P-R (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEPHANIE.P.MILLER.CIV>	Kurta, Anthony M SES OSD OUSD P-R (US) <anthony.m.kurta.civ@mail.mil>; Barna, Stephanie A SES OSD OUSD P-R (US) <stephanie.a.barna.civ@mail.mil>; Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Penrod, Virginia S SES OSD OUSD P-R (US) <virginia.s.penrod.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>	Email from Director of Military Accessions Policy responding to Deputy Assistant Secretary of Defense for Military Personnel Policy concerning policies governing transgender individuals' service in military in view of Presidential announcement	AC - Attorney Client Privilege; DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Seeking or providing legal advice regarding transgender policy; Seeking or providing legal advice regarding litigation risk
DoD000002786	USDOE00073625			USDOE00073625					7/26/2017	Kurta, Anthony M SES OSD OUSD P-R (US) <anthony.m.kurta.civ@mail.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Barna, Stephanie A SES OSD OUSD P-R (US) <stephanie.a.barna.civ@mail.mil>; Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Penrod, Virginia S SES OSD OUSD P-R (US) <virginia.s.penrod.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>	Email in chain in DoD000002785 from Deputy Assistant Secretary of Defense for Military Personnel Policy concerning policies governing transgender individuals' service in military in view of Presidential announcement	AC - Attorney Client Privilege; DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Seeking or providing legal advice regarding transgender policy; Seeking or providing legal advice regarding litigation risk

EXHIBIT C

DOCUMENT FILED UNDER SEAL

EXHIBIT D

DOCUMENT FILED UNDER SEAL

EXHIBIT E

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2,)	Civil Action
JANE DOE 3, JANE DOE 4,)	No. 17-cv-1597 (CKK)
JANE DOE 5, JOHN DOE 1,)	
REGAN V. KIBBY, and)	
DYLAN KOHERE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
DONALD J. TRUMP, in his)	
official capacity as)	
President of the)	
United States; et al.,)	
)	
Defendants.)	
-----)	

Complete caption on Page 2.

Tuesday, April 17, 2018

Deposition of COL. MARY KRUEGER, M.D., taken at
the offices of Foley Hoag LLP, 1717 K Street NW,
Washington, D.C., beginning at 9:11 a.m., before
Nancy J. Martin, a Registered Merit Reporter,
Certified Shorthand Reporter.

1 and the rest of your group had going into this task?

2 A. I don't recall.

3 Q. So you pointed earlier to one of the
4 various pages that lists courses of action here, and I
5 don't know what any of them are, but just to look at
6 those, did any of the courses of action that you saw
7 on this slide deck include the option of keeping the
8 open service policy in effect as it was before the
9 tweets?

10 MS. ENLOW: Objection. That calls for
11 deliberative process.

12 MS. LAPORTE: No, I don't think it does at
13 all. I'm not asking for what anybody said. I'm
14 merely asking for a benchmark of what the subject
15 matter was and how open things were.

16 MS. ENLOW: That question asked for whether
17 or not the group was considering keeping the Carter
18 policy in effect. That's deliberative.

19 MS. LAPORTE: Well, I'm not asking what they
20 ultimately deliberated about that or what they
21 decided, but I am interested and I think we're
22 entitled to understand the contours of what the
23 decision was of what they were being asked to make.

24 MS. ENLOW: The different courses of action
25 or policies that they considered are predecisional and

1 deliberative, and therefore, squarely covered by the
2 deliberative process privilege.

3 MS. LAPORTE: Well, the ones that they did
4 consider, yes, but I'm asking about whether they did
5 not consider certain policies.

6 MS. ENLOW: That's also deliberative. What
7 they considered necessarily tells you what they didn't
8 consider.

9 MS. LAPORTE: Okay. So I hear what you're
10 saying and certainly disagree with it. I would also
11 say that I'm concerned about this assertion of
12 deliberative process privilege in the context of a
13 situation where the government is now relying on this
14 process as a justification for the new policy. And so
15 it seems to me that there is either a waiver or we
16 have a need to understand this deliberative process,
17 at least to the very general extent that I am asking
18 in this deposition.

19 Will you maintain your objection even given
20 the fact that you are relying on the process?

21 MS. ENLOW: Yes. I maintain the objection
22 that it is deliberative what the panel of experts
23 considered before they got to their final
24 recommendation, yes.

25 MS. LAPORTE: Well, right now I'm not asking

1 about the panel of experts. I'm asking about the
2 Transgender Personnel Policy Working Group.

3 MS. ENLOW: Personnel Policy Working Group
4 fed into the panel of experts. So their work of the
5 subordinates that ultimately lead to the decision is
6 predecisional and deliberative. So yes.

7 MS. LAPORTE: Okay. So you object to the
8 question.

9 And can you just read the question again,
10 please.

11 (Record read.)

12 MS. ENLOW: I'm instructing you not to answer
13 that question.

14 THE WITNESS: Okay.

15 BY MS. LAPORTE:

16 Q. Are you going to follow that instruction?

17 A. Yes. Sure. You would want your client to
18 follow your advice too.

19 Q. Yes. We typically ask that too.

20 MS. LAPORTE: Okay. Let me figure out what
21 my options are, then, my courses of action in view of
22 that instruction.

23 Why don't we take five.

24 (A recess was taken from 11:47 a.m.

25 to 12:16 p.m.)

EXHIBIT F

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2,)	Civil Action
JANE DOE 3, JANE DOE 4,)	No. 17-cv-1597 (CKK)
JANE DOE 5, JOHN DOE 1,)	
REGAN V. KIBBY, and)	
DYLAN KOHERE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
DONALD J. TRUMP, in his)	
official capacity as)	
President of the)	
United States; et al.,)	
)	
Defendants.)	

-----)

Complete caption on Page 2.

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Thursday, February 1, 2018

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Deposition of MARTIE SOPER, taken at the offices of Foley Hoag LLP, 1717 K Street NW, Washington, D.C., beginning at 9:13 a.m., before Nancy J. Martin, a Registered Merit Reporter, Certified Shorthand Reporter.

1 MR. PARKER: I'm going to just object to the
2 extent this is more than a "yes" or "no" question.

3 BY MS. LAPORTE:

4 Q. You can answer that "yes" or "no."

5 A. Yes.

6 Q. So you're aware that they have reached some
7 decisions about accessions?

8 A. I am aware that they have provided
9 recommendations.

10 Q. Okay. And did they vote on the
11 recommendations that they were going to be making?

12 A. I have no idea.

13 Q. Okay. Is it true that they recommended in
14 favor of accessing only transgender people who will
15 not seek transition to the preferred gender?

16 MR. PARKER: Objection. The answer to that
17 question calls for deliberative material.

18 MS. LAPORTE: Well, I think that once they're
19 done deliberating and they've voted on it, it's not
20 really deliberative anymore.

21 MR. PARKER: You're asking for the
22 recommendation of a panel for a decision process
23 that's ongoing. There hasn't been a final decision.
24 So it's both predecisional and deliberative.

25 BY MS. LAPORTE:

1 Q. Well, once they've voted, I don't think that
2 it's deliberative at all. It just reflects the final
3 decision that they've arrived at.

4 MR. PARKER: The witness testified that the
5 panel has made a recommendation and an ongoing
6 decision process. A recommendation would be a
7 deliberative statement or a recommendation, and it
8 would be predecisional because a final decision hasn't
9 been made on a new policy.

10 BY MS. LAPORTE:

11 Q. Are you aware -- this is just "yes" or
12 "no" -- of what the recommendations are that the panel
13 of experts has made to the Secretary of Defense?

14 A. No.

15 Q. Are you aware of what their recommendations
16 about accessions have been, "yes" or "no"?

17 A. No.

18 Q. What about the handling of people who are
19 already in service and who identify as transgender?
20 Have you heard, yes or no, what their decisions have
21 been with respect to those people?

22 A. No.

23 MS. LAPORTE: All right. Why don't we take a
24 brief break.

25 (A recess was taken from 4:15 p.m.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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JANE DOE 2 <i>et al.</i> ,)	
)	
	Plaintiffs,)	
v.)	Civil Action No. 17-cv-1597 (CKK)
)	
JAMES N. MATTIS, in his official capacity as)	
Secretary of Defense, <i>et al.</i> ,)	
)	
	Defendants.)	
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PROPOSED ORDER

Upon Consideration of Plaintiffs’ Motion to Compel Production of Documents and Information Withheld Under the Deliberative Process Privilege, Defendants’ opposition thereto, Plaintiffs’ reply, and the parties’ memoranda, declarations, and exhibits, the Court hereby orders that Defendants must produce documents and other information previously withheld on the basis of the deliberative process privilege.

So ORDERED this _____ day of _____, 2018.

COLLEEN KOLLAR-KOTELLY
U.S. DISTRICT JUDGE